INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
1. *Background*	2
2. *The first grand jury (Count I)*	4
3. *The second grand jury (Count II)*	8
4. *The instructions*	10
Argument	11
Conclusion	14

CITATIONS

Cases:	
Brown v. *Walker*, 161 U.S. 591	11
Catrino v. *United States*, 176 F. 2d 884	12
Grunewald v. *United States*, 353 U.S. 391	13
Rosner v. *United States*, 10 F. 2d 675	13, 14
United States v. *Grunewald*, 233 F. 2d 556	13
United States v. *Herron*, 28 F. 2d 122	14
United States v. *Polakoff*, 121 F. 2d 333, certiorari denied, 314 U.S. 626	12
United States v. *Russell*, 255 U.S. 138	12
Statute: 18 U.S.C. 1503	11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1002

MARVIN R. COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. I, 82–102; Pet. App. 1–27) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1964 (Vol. I, 82, 103). The petition for

[1] The record consists of nine volumes. Volumes 2 through 8, which are consecutively paginated, constituted the reporter's transcript of the trial and are referred to as "Tr." Volume I, which is separately paginated, contains assorted papers filed in the district court and the proceedings in the court of appeals, and is referred to as "Vol. I". Assorted government exhibits, which are on file with the Clerk of this Court, are referred to as "G. Ex."

a writ of certiorari was filed on April 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether one who demands that a witness before a grand jury invoke the privilege against self-incrimination and issues threats to that end may properly be convicted of obstructing justice under 18 U.S.C. 1503.

STATEMENT

A two-count indictment returned in the United States District Court for the Southern District of California charged petitioner with obstructing justice by corruptly endeavoring to influence and corruptly influencing and intimidating one Joel Benton, in connection with Benton's testimony before a federal grand jury, in violation of 18 U.S.C. 1503 (Vol. I, 2–3). After a trial by jury, petitioner was found guilty as charged (Tr. 960–962). On June 12, 1963, petitioner received concurrent fines of $1,000 on each count (Tr. 1035). On appeal, the conviction was unanimously affirmed (Vol. I, 82–102, 103).

The evidence may be summarized as follows:

1. *Background.* In 1955, petitioner, who was a director and officer of the advertising firm of Cole, Fischer & Rogow, hired Joel Benton as a copywriter and account executive at the firm's Beverly Hills, California, office, which petitioner managed (Tr. 141–143, 276, 503, 512). Benton worked there until mid-June 1957 (Tr. 142, 144–145, 276, 377, 378–381, 512). During this period, petitioner introduced Benton to one Joseph "Doc" Stacher and one Nate Stein (Tr.

164, 211–212). Petitioner told Benton that Stacher was the "No. 2 man in the syndicate" and that he, petitioner, was Stacher's "boy" (Tr. 217).[2] Stein and, to a lesser extent, Stacher visited the Beverly Hills office while Benton was employed there (Tr. 164–166, 174–175, 212–213, 279–280).

In late 1955 or early 1956, Benton, as a favor to Stein, endorsed four Teamsters' Union checks aggregating $4,400 made payable to Benton, and returned the checks to Stein (Tr. 155–158, 283, 324, 329, 352–353; see Tr. 159–162). Benton did not receive any of the proceeds from the checks.

In early 1958—after Benton had left Cole, Fischer & Rogow—Stein told Benton that a "full scale" investigation of James Hoffa and the Teamsters' Union was under way; that Benton might be contacted by the government with reference to the checks he had endorsed; and that, if contacted, Benton was to communicate with Stein through a third party (Tr. 313, 315, 329–330). Subsequently, an investigator from the General Accounting Office interviewed Benton regarding the four checks and his association with Stein. Pursuant to instructions from Stein, Benton, in a letter of June 6, 1958, to the investigator, said that he had received the money for services rendered in conducting a "truck survey" in California (*i.e.*, counting the number of trucks traveling between Los Angeles and San Francisco on particular days) and for developing a "TV idea" for use by the Teamsters'

[2] Petitioner did not indicate what he meant by the word "syndicate" (Tr. 217–218).

Union in connection with a radio or television show (Tr. 167–169, 311, 317–319, 321, 332–333, 335–337, 354–360). When Benton showed petitioner a copy of this letter, petitioner became "agitated" and said that Stein was a fool and that no one would believe that story (Tr. 168, 282, 344–345). Petitioner told Benton that he should contact petitioner in the event that government agents came around again (Tr. 421). After consulting with Stein, Benton submitted an affidavit dated June 27, 1958, to the Senate Select Committee on Improper Activities (the "McClellan Committee"), in which Benton related the same story contained in the letter of June 8 (Tr. 158–161, 361; G. Ex. 3). The affidavit was false because Benton had not made the truck surveys (Tr. 155–156, 163, 166, 168, 349, 352, 361; see Tr. 437–438) and had not personally received the money.

2. *The first grand jury (Count I).* In the spring of 1962, a federal grand jury, sitting in Los Angeles, commenced an investigation of Stacher's possible undisclosed ownership interest in the Sands Hotel, in Las Vegas, Nevada (Tr. 135–136, 560). Petitioner, who had previously told the F.B.I. that he knew Stacher only on a social basis (Tr. 487), apparently gave the grand jury the same account (Tr. 448, 450, 487, 498).

On May 27 or 28, 1962, Benton received a message indicating that Assistant United States Attorney Benjamin Farber had telephoned him (Tr. 148, 387; see Tr. 614–615). Benton reported this to petitioner (Tr. 148–151, 387), who told Benton not to worry, and

that they would discuss the matter after Benton talked to Farber (Tr. 149, 151, 387). When Benton returned the call, Farber requested Benton to come on June 7 to answer a few questions before the grand jury and told him that while he could not state what the investigation was about, Benton was not personally the subject of the investigation (Tr. 149). Benton agreed to appear (Tr. 150, 233).

Shortly thereafter, Benton telephoned petitioner (Tr. 150–151). When Benton said that he was going to be subpoenaed for June 7, petitioner replied that that was the last day the grand jury would be in session before they recessed for the summertime and suggested that Benton "take a vacation" so that he would not be there on the 7th (Tr. 233). Later that day at a meeting of petitioner, Benton and one Irving Reiss, petitioner told Benton that there was nothing to be concerned about, that all Benton had to do was to take the Fifth Amendment (Tr. 151, 153–154). When Benton said that he was afraid of what his employers might think if he took that course of action, petitioner replied that there was "nothing to worry about on that score", and that the government had "that other thing" hanging over his head (Tr. 154). (This referred to the false affidavit submitted to the McClellan Committee (Tr. 155–166).) When Benton expressed a desire to call an attorney named Marshall Sevin, petitioner told him that there was no need to tell Sevin all the details concerning his grand jury appearance, that Sevin should be retained to more or less "hold [Benton's] hand and be there in case something should happen" (Tr. 177, 392).

On the following day, petitioner told Benton that he "must take the Fifth Amendment" (Tr. 181, 183). He said that Benton would have "plenty of company" before the grand jury inasmuch as four or five of the "boys"—who were identified by name—would be there (Tr. 185). Petitioner gave Benton a slip of paper containing the phraseology for invoking the Fifth Amendment, stating that Benton should copy the words in his own handwriting and memorize them (Tr. 182–184). Petitioner and Reiss then drove Benton to his meeting with Sevin, the attorney (Tr. 186). After Benton had conferred with Sevin for about half an hour, petitioner telephoned Benton at Sevin's office, inquired whether the conference was concluded, and said that he would pick up Benton in a few minutes (Tr. 187, 430).

Shortly thereafter, Benton and Sevin left the building, and when petitioner and Reiss drove up, they entered petitioner's automobile (R. 188–189, 430–431, 437). Sevin, who had been told by Benton of the false affidavit (Tr. 437–438), said that he saw no reason why Benton should invoke the Fifth Amendment before the grand jury (Tr. 190, 431–432). Petitioner replied, "No, he has got to take the Fifth Amendment" (Tr. 190, 393–394, 432), and added that there was "something that they have got that makes it absolutely imperative for him to go down there and take the Fifth Amendment" (Tr. 191, 192, 394, 432). When Sevin repeated his opinion, petitioner raised his voice and said, "He has absolutely got to take the Fifth Amendment, he has no other choice" (Tr.

191–192, 436). Sevin testified that petitioner's manner of speaking was not that of a person merely making suggestions or giving advice; that his statements were not "in the form of questions as much as they were a manner of a demanding nature, they were urgent insistence" (Tr. 436). Benton testified that he had never before seen petitioner in such a condition, and that he was "frightened" (Tr. 194, 207–208). Sevin then told Benton that the "boys" were "right", that he saw their "point", and that Benton had better take the Fifth (Tr. 192, 395).[3]

On May 31, 1962, a subpoena was issued to Benton, directing him to appear and testify before the grand jury on June 7, 1962 (Tr. 234–235, 614–615; G. Ex. 4). On that date, Benton appeared before the grand jury and invoked the Fifth Amendment to questions whether he was ever an employee of Cole, Fischer & Rogow and whether he had ever seen an individual named Joseph Stacher (Tr. 136–137, 223; G. Ex. 2). After invoking the Fifth Amendment to another question, Benton was excused. Benton testified that he pleaded the Fifth Amendment because of the "insistence" of petitioner that he do so (Tr. 226).

After leaving the Federal Building, Benton telephoned petitioner (Tr. 227–228) who arrived with Reiss a few minutes later. Benton told petitioner what questions had been asked and the answers he had given (Tr. 228). Petitioner said that he wanted

[3] Sevin testified that, while he never changed his mind about the course that Benton should follow, he nevertheless "verbalized" an opinion that he did not actually hold (Tr. 438–439).

to take care of Sevin's fee, that Benton should pay Sevin by check, and that petitioner would reimburse Benton (Tr. 230; see Tr. 232). Later, Benton paid Sevin's fee of $100, and petitioner gave Benton a $100 bill (Tr. 231, 265, 396–397, 442).

On June 21, 1962, Benton voluntarily contacted government agents and gave them a sworn statement, part of which concerned the false affidavit submitted on behalf of Stein (Tr. 234, 236, 239–240, 396–397). No promises or inducements were made to Benton (Tr. 401).

3. *The second grand jury* (*Count II*). In July 1962, another federal grand jury commenced an investigation of petitioner for possible perjury and obstruction of justice before the first grand jury (Tr. 123–125, 137–138; G. Ex. 2). Petitioner knew that he was being investigated by the grand jury (Tr. 123–125; see Tr. 112–113). On October 9, 1962, Benton was subpoenaed to appear before that body on October 18, 1962 (Tr. 235–236; G. Ex. 5).

Shortly thereafter, Benton telephoned petitioner at the request of an Assistant United States Attorney and informed him that he had received a subpoena to appear on October 18 before the grand jury (Tr. 240, 244, 251, 399). No government agent made any suggestions as to what Benton was to talk about, and the conversation was recorded with Benton's knowledge and consent (Tr. 251, 399, 406–409, 622–623; G. Ex 7). Benton told petitioner that he thought that he would go down and testify. When Benton said that on his first appearance he was questioned only

about petitioner, Stacher and others, and that he believed that the inquiry would not go beyond that, petitioner replied, "No, this time is different. This time it's on the union thing, kid. They are hammering away on that pretty good I understand. All over the country. That's where you have got a problem" (Tr. 247; G. Ex. 7). Petitioner said that Benton should not contact Sevin "yet", and arranged to telephone him later.

On the following day, petitioner and Reiss picked up Benton, who had a radio transmitter concealed on his person, and the trio drove to the Bantam Cock Restaurant (Tr. 252–253, 623–624). Petitioner asked Benton where he received "such a silly idea as not to go down and take the Fifth", stating that that was "foolish", and Benton "must go down and take the Fifth" (Tr. 253). Petitioner said that the only way Benton could get himself into any "trouble" was by testifying, that everything would be "all right" if he kept his "mouth shut," and that everyone in his office and even his maid had taken the Fifth (Tr. 260). Petitioner then told Benton that he would be "stupid" not to take the Fifth, pointing out that other individuals had had the idea of testifying but that "fortunately he [petitioner] had been able to talk them out of it" (Tr. 261–262). Petitioner said that Benton should talk to a "good attorney" before making up his mind (Tr. 263). When Benton said that he had Sevin in mind, petitioner replied, "No, I don't mean like Marshall Sevin. I mean a real heavyweight, what you need is a real heavyweight"

(Tr. 263). Petitioner then suggested the name of an attorney, stating that he would arrange an appointment. When Reiss said that the attorney was "too high-priced", petitioner replied, "Don't worry about that, we will take care of it" (Tr. 264, 404, 406). In an "excited and loud" tone of voice, petitioner said, "Now, don't forget this, Joel, * * * if you do testify you will lose your job" (Tr. 261, 657, 658, 632–633). He also said, "I will see to it that if you do take the Fifth, you do not lose your job" (Tr. 261, 632–633, 657, 658).

On October 17, 1962—the day before Benton's scheduled grand jury appearance—petitioner telephoned Benton and arranged to meet him that day. At about 12:30 p.m., petitioner and Reiss drove up to a parking lot and met Benton (Tr. 269–270, 549). Petitioner told Benton that he "most assuredly" would lose his job if he testified; that he should discuss the situation with Nate Stein before doing "something foolish"; and that no one would believe him (Tr. 271). Petitioner then said, "Joel, even if you don't care about what happens to yourself, remember this, you have got a lovely wife and family, and * * * you wouldn't want anything to happen to them, would you?" (Tr. 272). When Benton replied in the negative, petitioner added, "Well, remember, Jimmie Hoffa's boys are mighty rough" (Tr. 272). On the following day, the grand jury returned the instant indictment.

4. *The instructions.* In its instructions to the jury, the district court charged that Benton had the right

to invoke the Fifth Amendment before the grand jury; that petitioner did not request Benton to do something illegal; and that the petitioner had the right to advise and perhaps argue that Benton should take the Fifth Amendment (Tr. 932). The court also charged, in part (Tr. 934):

> This would be a comparatively easy case if the government had been able to prove that Benton was asked to do something illegal, but because Benton was asked to do something that was not illegal, you have to find not only that the request was made, but it was made in such a way that it was more than a request, that it was a demand, that it was an insistence, that the defendant did something that he was not entitled to do.

ARGUMENT

1. Petitioner's contention that his conduct in this case could not have constituted an obstruction of justice of the sort prohibited by 18 U.S.C. 1503 because the witness was constitutionally entitled to claim the privilege against self-incrimination is without merit. The constitutional privilege against self-incrimination protects a witness against being compelled to provide answers which might reasonably tend to incriminate him, but it may not be used "as a pretext for securing immunity to others." *Brown* v. *Walker*, 161 U.S. 591, 597, 600. The effect of invoking the privilege is to foreclose a line of inquiry; hence the result of an improper resort to the privilege is as harmful to the due administration of justice as if the witness were forcibly or fraudulently prevented from

appearing before the grand jury. There is, for example, no practical difference between bribing a prospective witness to flee the jurisdiction and bribing him to invoke an available privilege against self-incrimination which he would not otherwise claim. Either action obstructs the proper administration of justice, and both are covered by the inclusive language of the governing statute.[1] Nor should there be any difference between the payment of a bribe to induce a witness to claim the privilege against self-incrimination and what this record discloses—*i.e.*, the use of threats or other coercive measures to compel a witness to invoke this privilege of silence, despite his expressed intention, buttressed by advice of counsel, not to claim it. Consequently, although the witness might personally invoke the privilege, it is unlawful for a third party to coerce or induce him to claim it for the protection of the third party.

2. The district court charged (Tr. 932–934), that one does not violate 18 U.S.C. 1503 by recommending or advising that a witness invoke his constitutional privilege against self-incrimination. The jury, under the judge's charge, found that petitioner's acts went beyond mere advice and that they amounted to threats or coercion done with corrupt motive. There was, as

[1] It has been said that 18 U.S.C. 1503 prohibits any one of the "variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined." *Catrino* v. *United States*, 176 F. 2d 884, 887 (C.A. 9). See also *United States* v. *Russell*, 255 U.S. 138; *United States* v. *Polakoff*, 121 F. 2d 333, 334 (C.A. 2), certiorari denied, 314 U.S. 626.

the court of appeals concluded, substantial evidence from which the jury could infer that petitioner's motive was to prevent "any investigation of any relationship between Stacher and Cole" (Pet. App. 14), and not to protection Benton's constitutional rights. That such conduct violates the statute was settled by this Court's opinion in *Grunewald* v. *United States*, 353 U.S. 391, 424, when it said:

> Finally, we find no substance to Halperin's contention that he was in effect convicted for advising, as a lawyer, some of the witnesses before the grand jury that they had a right to plead their Fifth Amendment privilege. The evidence against Halperin under these Counts was quite sufficient to make out a case for submission to the jury.

See the discussion of this point in the court of appeals' opinion in *United States* v. *Grunewald*, 233 F. 2d 556, 570–571 (C.A. 2).

3. Contrary to petitioner's assertion (Pet. 19–21), the decision of the court of appeals does not conflict with *Rosner* v. *United States*, 10 F. 2d 675 (C.A. 2), where it was held that it is not an obstruction of justice to advise a defendant in a criminal case to disregard a letter written by a prosecutor requesting the defendant to appear in court. In *United States* v. *Polakoff*, note 4, *supra*, the Second Circuit limited *Rosner* to its special facts, the court noting that "since a mere request by the prosecutor that an accused appear could be disregarded as not compulsory process, advice to that end was not illegal." 121 F. 2d at 335. In the instant case, on the other hand, cor-

rupt methods were employed by petitioner to induce another to make certain statements while under oath and in the course of a lawful grand jury investigation. Hence it cannot be said here, as it was in *Rosner*, that petitioner's acts did not concern any part of the lawful "administration" of justice.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

MAY 1964

United States v. *Herron*, 28 F. 2d 122, was a district court case in the Northern District of California and if applicable was overruled by the opinion below.